Supreme Court, U.S.
FILED
JUN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1921

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

LIFETIME DOORS, INC.,
Petitioner,

v.

BARBER & ROSS CO.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT WITH RESPECT TO CORPORATE SUBSIDIARIES AND AFFILIATES

Undersigned counsel certifies that respondent, Barber & Ross Co., has no corporate parents, subsidiaries, or affiliates within the meaning of Supreme Court Rule 28.1.

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RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On the evidence presented, the jury was entitled to find, and presumably did find, the following facts. Barber & Ross Co., plaintiff below, was in the millwork supply business—it purchased from various manufacturers interior and exterior wood trim products, such as doors, moldings, and bannisters, for eventual use in new home construction; it prepared and packaged those products for easy installation by builders, and delivered them to construction sites. A key part of the service Barber & Ross provided was delivering to each house at the right

time in the construction process the precise collection of millwork products needed by a builder.

Lifetime Doors, Inc., defendant below, was the nation's largest manufacturer of doors. Lifetime was, by its own estimate, at least two and a half times the size of its next largest competitor. The bulk of Lifetime's output consisted of "flush" doors, which are plain rectangular doors typically made with a hardboard outer layer, known as a "skin." Lifetime also manufactured doors with a molded or sculpted "skin" designed to imitate traditional, wood panelled doors ("six panel" doors). These six panel doors, which were more expensive than flush doors, were the mainstay of Barber & Ross' business because they were popular in the colonial style housing that predominated in the area where Barber & Ross did business.

In early 1983, Lifetime's regional sales manager solicited Barber & Ross' six panel business—an account sufficiently large that Barber & Ross would be one of Lifetime's top six panel customers in the southeastern United States, generating almost a million dollars in sales annually. After Lifetime agreed to supply Barber & Ross' requirements of approximately four truckloads of six panel doors per month, as well as the flush doors it was already providing, Barber & Ross agreed to shift all of its six panel purchases to Lifetime.

Within a few months, however, in July of 1983, Lifetime drastically altered the terms on which it was willing to honor that commitment. Lifetime instituted what it called an "allocation system" for the sale of six panel doors: from then on, the number of six panel doors any customer could buy was to be limited according to the number of flush doors that customer bought. Lifetime's president told his sales force that Lifetime was imposing this system because it was no longer willing to sell six panel doors to customers that bought their flush doors from Lifetime's competitors. In implementing this sys-

tem, Lifetime reviewed its customers' past purchases of six panel and flush doors, and then mandated various ratios of flush to six panel purchases, depending upon the customers' past purchases, which ratios required that they buy a far greater percentage of flush doors than many of its largest six panel door customers, including Barber & Ross, had previously demanded.

Lifetime's salesmen told customers that six panel doors were not available, and they refused to fill orders unless the customers also bought the prescribed number of flush doors. At the same time, however, Lifetime was accumulating a substantial inventory of unsold six panel doors. The only two domestic sellers of six panel door skins, an essential component in the manufacture of six panel doors, announced that they were going to limit the door manufacturers' skin purchases; but Lifetime, as their largest customer, actually received an allotment of six panel skins for the remainder of 1983 that exceeded its previous share. Thus, while word spread in the summer of 1983 that there might be a "shortage" of six panel doors, Lifetime had the ability to make and sell more six panel doors than ever before, and would have done so but for its decision to impose its so-called "allocation system."

Lifetime's strategy of stockpiling six panel doors and tying the sale of six panel doors to the sale of flush doors tremendously disrupted the business of many of its customers, including Barber & Ross. During the summer of 1983, Barber & Ross received only half as many six panel doors as it needed, along with thousands more flush doors than it wanted or could readily use. Barber & Ross was forced to bear the expense of warehousing the flush doors it did not yet need, while at the same time it had to deliver to customers millwork packages that lacked the six panel doors they wanted. A number of Barber & Ross' previously loyal, long-time customers cancelled orders and took their business elsewhere.

When Barber & Ross pressed Lifetime in August for assistance in meeting its customers' demands, particularly in light of Lifetime's agreement just a few months earlier to supply Barber & Ross' requirements of six panel doors, Lifetime insisted that any shipments to Barber & Ross would have to be within the "allocation" guidelines Lifetime had established. Those guidelines mandated that Barber & Ross buy three flush doors for each six panel door it wanted, even though Lifetime knew that meant that Barber & Ross would have to purchase what amounted to more than a five month stock of flush doors in order to obtain just a one month supply of six panel doors. When Barber & Ross told Lifetime that it doubted the legality of this system, Lifetime terminated all shipments to Barber & Ross.

This abrupt termination left Barber & Ross with no supply of six panel doors at a time when other manufacturers were unwilling to take on major new customers of Barber & Ross' size. Despite its efforts to find alternative sources of supply and even to develop a substitute, imitation six panel door of its own, Barber & Ross lost a significant amount of business because it could not supply the mix of doors its customers wanted.

Lifetime's tying of flush door sales to six panel door sales succeeded in forcing many of its customers to purchase a mix of doors quite different from what they wanted. Lifetime's goal of not selling six panel doors to customers that purchased flush doors from its competitors was essentially achieved. In addition, with the six panel doors it withheld from Barber & Ross and others, Lifetime solicited and gained a substantial number of new six panel customers on the condition that these new customers agree to buy approximately eight flush doors for every six panel door they received. By forcing this change in its existing customers' buying patterns, and by gaining these new customers who were made to buy a tremendous number of flush doors to obtain just a few

six panel doors, Lifetime significantly increased its flush door sales even though demand in the market generally was declining.

Competing flush door manufacturers were adversely affected by Lifetime's effective use of six panel doors to expand its share of the flush door market. New entrants were virtually shut out of the market because they found that many potential customers were being forced to buy all their flush doors where they bought their six panel doors. Flush door sales were increasingly determined by control of the six panel door market, rather than by competition on the merits for flush doors.

Barber & Ross brought the instant action in the United States District Court for the Eastern District of Virginia, claiming, among other things, (1) that Lifetime had restrained trade in violation of the federal antitrust laws by tying the sale of flush doors to the sale of six panel doors, and (2) that Lifetime had breached the agreement the parties had reached early in 1983 when Lifetime solicited Barber & Ross' six panel business. The jury found for Barber & Ross on both these antitrust and contract claims, and specifically found that Lifetime's practice of tying the sale of flush doors to the sale of six panel doors was both a *per se* violation of the antitrust laws and an unreasonable restraint of trade under the rule of reason.

On appeal, Lifetime's primary challenge to the antitrust verdict was that Barber & Ross lacked standing because it had suffered no cognizable antitrust injury. Lifetime attacked the conclusion that it had committed a *per se* violation of the antitrust laws on the ground that its market share was inadequate as a matter of law for it to possess the market power necessary for a *per se* violation. As to the rule of reason verdict, Lifetime argued that there was insufficient evidence to establish a geographic boundary for the tied product market. Lifetime also challenged the determinations that an en-

forceable contract existed between the parties and that it had breached that contract, as well as the proof of Barber & Ross' damages.

The court of appeals found no serious question about Barber & Ross having suffered antitrust injury; and, in a narrow opinion, it affirmed the antitrust verdict on the basis of the rule of reason violation found by the jury, without reaching the *per se* issue. It also rejected Lifetime's arguments with respect to the contract verdict and damages.

REASONS FOR DENYING THE WRIT

I. The Fourth Circuit Correctly Analyzed the Issues Presented for Appellate Review and Established No New Precedent In So Doing.

In arguing that this Court should review the court of appeals' decision in this case, Lifetime repeatedly refers to "the Fourth Circuit Rule." Petition ("Pet.") at 5-7, 10-12. The court below, however, established no new rule of law in deciding this case. It analyzed correctly those specific questions presented by Lifetime for its review. It discussed at some length Lifetime's threshold argument that Barber & Ross had suffered no antitrust injury. Appendix to Petition ("App.") at 7a-9a. And it disposed of Lifetime's only other basis for seeking reversal of the rule of reason verdict—the alleged insufficiency of the evidence of the geographic boundary of the tied product market. App. at 10a.

Lifetime now abandons its earlier arguments and tries instead to create a defective "rule of law" from the Fourth Circuit's responses to the precise issues Lifetime raised on appeal. As will be demonstrated below, however, the court of appeals correctly decided this case on the basis of the particular factual record before it, and its opinion stands for none of the far-reaching propositions Lifetime suggests.

Moreover, Lifetime identifies no conflict among the circuits or likely confusion among the lower courts as to the applicable legal principles. This Court addressed this area of antitrust law at length just three years ago in *Jefferson Parish Hosp. District No. 2* v. *Hyde* ("*Jefferson Parish* v. *Hyde*"), 466 U.S. 2 (1984), and there is no need for further review by the Court at this time.

A. The Fourth Circuit Opinion Does Not Improperly Eliminate Market Power as a Consideration in Rule of Reason Analysis.

Lifetime's primary argument is that the court of appeals ignored the question of Lifetime's market power over the tying product. Pet. at 5-10. But the reason the Fourth Circuit did not discuss market power in responding to Lifetime's attack on the rule of reason verdict is that Lifetime never raised this issue on appeal. Indeed, at no time during this litigation, until now, did Lifetime advance this argument. In its post-trial motion for judgment notwithstanding the verdict, Lifetime raised no issue about market share or market power in challenging the rule of reason verdict.[1] And it did not brief or argue this point in its appeal. Because Lifetime failed to preserve this issue on appeal, this Court should not consider it. *See, e.g., City of Springfield* v. *Kibbe*, —— U.S. ——, 107 S.Ct. 1114, 1115-16 (1987) (no review of issues not pursued below absent exceptional circumstances).

During every stage of this litigation, moreover, the issue of market power was litigated. Lifetime based its

[1] In its motion for a directed verdict on all of Barber & Ross' antitrust claims, Lifetime attacked Barber & Ross' evidence of market power as too speculative, arguing that the data Barber & Ross presented as to various door manufacturers' six panel "skin" purchases (an essential input in making these doors) could not support any inference about those manufacturers' share of the six panel door market. In these circumstances, it appears that Lifetime failed to preserve the issue it now seeks to raise in the district court, quite apart from its subsequent failure to preserve it in the court of appeals.

defense to Barber & Ross' claim of a *per se* violation on the proposition that, given its market share, Lifetime did not have the market power necessary for a *per se* violation. The trial court rejected Lifetime's argument that it should give no instruction on the alleged *per se* violation because Lifetime lacked market power as a matter of law, and instructed the jury that it must decide whether Lifetime had market power in reaching its verdict on Barber & Ross' *per se* claim. The jury found market power here, as indicated by its affirmative response to the special interrogatory about whether Lifetime's conduct was a *per se* violation of the antitrust laws.

Because Lifetime pursued this defense to the *per se* violation on appeal, the parties briefed and argued the sufficiency of the evidence of Lifetime's market power in the tying product market. That evidence showed that Lifetime did have market power, as the jury found. Lifetime was by far the dominant six panel door manufacturer, with a market share of over thirty percent in a market where its next largest competitor had a share of only about ten percent.[2] Barber & Ross' expert testified that this relative size advantage was a significant factor in his concluding that Lifetime possessed market power. J.A. 1154.[3] Moreover, the record contained evidence that Lifetime behaved like a firm with market power: (1) it was able to restrict output by accumulating six panel inventory at a time of increasing demand, (2)

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[2] For these purposes, of course, conflicts in the evidence must be resolved in favor of the party for whom the jury found. *See, e.g., Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 696 (1962). Much of Lifetime's statement of facts and argument ignores this fundamental precept of appellate practice and asks this Court to accept its view of conflicts in the evidence that the jury obviously resolved against it.

[3] For purposes of this Brief in Opposition, the record below is the Joint Appendix prepared in connection with the appeal of this matter, cited herein as "J.A."

it effectively raised six panel door prices by requiring more flush door purchases for each six panel door its customers purchased, and (3) it was able to impede new entry by would-be competitors. J.A. 1105-06, 1160-65, 1324-25, 1950-61, 2316-23.

As this Court has made clear, moreover, the reason to consider market power in a tying case is to assess the likelihood of anticompetitive forcing. *See Jefferson Parish* v. *Hyde*, 466 U.S. at 12-14. Here, the record contained direct evidence of such anticompetitive forcing—that is, substantial, unwanted purchases of the tied product by Lifetime's customers as a result of the coercive effect of Lifetime's tie. A number of Lifetime's customers testified that, due to Lifetime's position in the six panel door market and the lack of viable alternative sources of those doors, they unwillingly increased their flush door purchases from Lifetime, as required by Lifetime's so-called "allocation system," in order to assure continued shipments of six panel doors. J.A. 1022-23, 1068-69, 1374-75. A detailed statistical examination of Lifetime's six panel customers in the southeastern United States revealed a widespread pattern of dramatic increases in flush door purchases after Lifetime imposed its tie, entirely out of proportion to those customers' previous purchasing patterns, and in obvious response to the high ratios of flush to six panel purchases mandated by the tie. J.A. 1172-75, 2016-19.

To the extent Lifetime argues that a separate finding of market power in the tying product market is an essential element of every rule of reason tying violation, Pet. at 5-6, notwithstanding the evidence of anticompetitive forcing or foreclosure, it ignores a key portion of this Court's opinion in *Jefferson Parish* v. *Hyde*. After discussing at length the importance of market power in establishing a *per se* tying violation, the Court observed:

> When, however, the seller does not have either the degree or the kind of market power that enables

> him to force customers to purchase a second, unwanted product in order to obtain the tying product, an antitrust violation can be established only by evidence of an unreasonable restraint on competition in the relevant market.

466 U.S. at 17-18. In other words, a tie-in may run afoul of the rule of reason even without a specific finding of market power in the tying product market, if the plaintiff can meet the typically much more difficult burden of proving an unreasonable restraint on competition in the tied product market. This Court has made that same point in discussing the significance of showing market power in the context of other rule of reason violations:

> Since the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, "proof of actual detrimental effects, such as a reduction of output" can obviate the need for an inquiry into market power, which is but a "surrogate for detrimental effects."

Federal Trade Commission v. *Indiana Federation of Dentists*, —— U.S. ——, 106 S.Ct. 2009, 2019 (1986) (citation omitted).

In sum, there is no basis for Lifetime's claim that the opinion below somehow stands for the proposition that even the weakest competitor in a market presumptively violates the antitrust laws if it sells two products together, and its sales thereafter increase. Pet. at 5. The court of appeals' review of the facts of this case, in which it expressly referenced the record proof of Lifetime's ability to restrict output and to use its power over the tying product to force its customers to make otherwise unwanted purchases of the tied product, App. at 5a-6a, 10a, makes it perfectly obvious that the Fourth Circuit's decision refers to a firm with the power to coerce, and not to the "weakest competitor" in the market.

B. The Fourth Circuit Adequately Considered the Sufficiency of the Evidence as to the Anticompetitive Effect of Lifetime's Conduct.

Lifetime also complains about the court of appeals' terse discussion of the evidence that Lifetime's conduct had a demonstrable anticompetitive effect. Pet. at 10-12. As in the case of its market power argument, however, Lifetime is itself responsible for what it now claims is a serious omission in the Fourth Circuit's opinion. Lifetime's sole basis for seeking reversal of the rule of reason verdict was a supposed defect in the geographic definition of the tied product market.[4] In making that argument, Lifetime summarized Barber & Ross' evidence of anticompetitive effect, and then insisted that "[a]bsent a showing of the geographic scope of the market, there was no way to determine whether these facts indicated an unreasonable restraint of trade in the flush door market." Brief for Appellant at 30. Lifetime did not contend, as it does now, that even accepting Barber & Ross' geographic definition of the tied product market, the evidence of anticompetitive effect was inadequate.

The Fourth Circuit summarily rejected Lifetime's attack on the sufficiency of the evidence to define the geographic boundary of the tied product market, App. at 10a, and found ample evidence of an anticompetitive effect in the circumstances of this case. *Id.* In so doing, the court answered the question Lifetime now raises.

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[4] Barber & Ross contended that the relevant geographic market for both six panel and flush doors was the United States, east of the Mississippi River. Lifetime argued for a nationwide market. Despite evidence that most buyers purchased and most sellers sold the two types of doors together, and expert testimony outlining the other factors that suggested a geographic market for doors generally (*i.e.*, transportation costs, area within which consumers looked to purchase, etc.), and despite Lifetime's acceptance for purposes of appeal of the sufficiency of the evidence as to the geographic boundary for the six panel door market, Lifetime nonetheless claimed that this same evidence was not sufficient to establish the geographic boundary for flush doors.

The particular facts in the record before the court of appeals make it obvious that, despite Lifetime's argument to the contrary, this is not a case in which the only evidence from which to infer an anticompetitive effect is that Lifetime's sales of the tied product increased. Pet. at 10-12. Rather, the record contains evidence that those sales increased precisely because Lifetime engaged in anticompetitive forcing of its customers.[5] There was also evidence that Lifetime took market share from its competitors and deterred entry by would-be flush door competitors. J.A. 1105-06, 1182-86. Finally, Lifetime's president admitted that the foreclosure of his competitors was the very purpose of his actions—as he put it, Lifetime was no longer willing to sell six panel doors to customers that bought flush doors from its competitors. J.A. 2316.[6]

Moreover, there was no need here to conduct a lengthy inquiry into the magnitude of the restraint in the tied product market. As this Court recently emphasized, no elaborate market analysis is necessary to sustain a rule of reason verdict if there is evidence of some adverse effect on competition, and the challenged practice has no pro-competitive justification. *See Federal Trade Commission* v. *Indiana Federation of Dentists*, 106 S.Ct. at 2018-19.[7] On the particular facts in this record, this is pre-

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[5] J.A. 1022-23, 1068-69, 1374-75. That evidence alone distinguishes this case from many tying cases, including *Jefferson Parish* v. *Hyde*, in which, as the Court noted, the record did not show that the defendant had been able to "force consumers to take . . . services they would not select in the absence of a tie." 466 U.S. at 28-29.

[6] Intent, of course, may be relevant to help determine effect in cases in which the pro-competitive or anticompetitive nature of the effect is ambiguous. *See, e.g., Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). The finding of anticompetitive effect, therefore, did not have to depend on an "unsupported assumption," Pet. at 11, but, rather, was based on the evidence.

[7] In so holding, of course, this Court merely reaffirmed its earlier conclusion that "where the anticompetitive effects of conduct can

cisely such a case. The evidence below demonstrated Lifetime's anticompetitive forcing of consumers and the substantial foreclosure of competitors in the tied product market, as well as its intent to produce these effects. On the other hand, Lifetime admitted that, in the circumstances of this case, it could articulate no pro-competitive benefits of or justifications for its conduct. J.A. 1428-29.[8]

In short, the facts here made it easy for the court of appeals to determine that the jury could reasonably find that the restraining effects of Lifetime's conduct outweighed its pro-competitive benefits. That determination was fully consistent with settled principles of antitrust analysis as reflected in the decisions of this Court and the other circuits.

C. The Court of Appeals' Opinion Establishes No Rule of Presumptive Illegality for Tied Sales.

As the evidence discussed above concerning market power and anticompetitive effect suggests, the court of appeals' decision creates no rule of presumptive illegality for tied sales. Lifetime's argument to the contrary, Pet.

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be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." *National Collegiate Athletic Association* v. *Board of Regents of Univ. of Okla.*, 468 U.S. 85, 110-11 n.42 (1984).

[8] This admission on Lifetime's part of no pro-competitive justification for its actions is the second and perhaps more important respect in which this case is factually distinct from many tying cases. *See, e.g., Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 514 n.9 (1969) (White, J., dissenting) (enumerating potentially pro-competitive effects of tying). That inability to find any pro-competitive rationale may be related in part to the fact that, as the court of appeals observed, there was evidence that Lifetime's stated justification for its allocation system was a mere "pretext" to conceal its anticompetitive intent. App. at 10a.

at 12, is simply not supported by the language of the court's opinion.

Due to the manner in which Lifetime framed the issues on appeal, the discussion of the substantive rule of reason tying violation is, in fact, the briefest section of the opinion below. To the extent the court of appeals' review of the sufficiency of the evidence here stands for any general proposition, it can only be this: in those cases, however rare, in which the facts demonstrate that the dominant firm in a market—which has shown its market power over the tying product by restricting output and effectively raising prices—intentionally uses its control of the tying product anticompetitively to force its customers to purchase the tied product, and it thereby succeeds in foreclosing significantly the opportunities for its competitors in the tied product market and even in deterring entry by would-be entrants into that market, and that dominant firm admits that such foreclosure was the purpose of its actions and that it cannot articulate any pro-competitive rationale whatsoever for its conduct, a jury may permissibly conclude that that firm has unreasonably restrained trade in violation of the antitrust laws.

II. The Court of Appeals' Determination Under the Virginia Statute of Frauds Raises No Issue of Federal Law.

Lifetime's final basis for seeking certiorari concerns the court of appeals' determination that certain documents distributed by Lifetime in soliciting business were sufficient to satisfy the Virginia Statute of Frauds. Pet. at 13-16. This is a question of state law, as to which Lifetime's position has already been considered and rejected during this litigation by three different district court judges in the United States District Court for the Eastern District of Virginia, and by a three-judge panel of the Court of Appeals for the Fourth Circuit. Morever, as the court of appeals made clear, its conclusion that

these writings satisfied the Virginia Statute of Frauds was not essential to its resolution of any of the antitrust issues in this case or to its affirmance of the damages award to Barber & Ross. App. at 10a & n.4.

There is, in short, no question of federal law implicated by the court of appeals' ruling that, under Virginia law, Lifetime's agreement with Barber & Ross was an enforceable contract.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 29, 1987